

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1273

To be argued by
STEVEN G. NELSON

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1273

UNITED STATES OF AMERICA,

—against—

CURTIS ROOSEVELT DAVIS,

Appellee,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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UNITED STATES OF AMERICA,

Appellee,

—against—

CURTIS ROOSEVELT DAVIS,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

Curtis Davis appeals from a judgment of the United States District Court for the Eastern District of New York (Thomas C. Platt, J.) entered on June 10, 1977 convicting him, after a jury trial, of one count of embezzlement of checks which came into his possession, and which were intended to be conveyed by the mail, in violation of Title 18, United States Code, Section 1709, and one count of unlawful possession of stolen checks, in violation of Title 18, United States Code, Section 1708. Davis was sentenced pursuant to the Youth Corrections Act and, under Title 18, United States Code, Section 5010(b), ordered committed to the custody of the Attorney General or his authorized representative until discharged by the United States Parole Commission under Title 18, United States Code, Section 5017. Davis is on bail pending appeal.

On appeal, Davis argues that the trial court failed to properly instruct the jury with respect to the element of intent, the presumption of innocence and the burden of proof.

Statement of Facts

In December of 1976, Davis was employed as a temporary mail carrier for the United States Postal Service. Although Davis had once before been a Postal Service employee, he had been forced to resign for misuse of postage meters (T. 351-357).¹ Davis obtained his new employment in the Postal Service by submitting false applications which neglected to mention his prior postal service and which gave a different date of birth and social security number than he had utilized in applying for his previous government employment (T. 375-379).

On December 31, 1976 Davis reported to Inspector Frank Citera and Inspector Brendan O'Brien of the Postal Service that he had been the subject of an armed robbery while on duty (T. 40). He stated that two men had stopped him and had taken some pieces of mail from him at gunpoint (T. 40-41). When Davis told Citera and O'Brien that he believed that he recognized one of his assailants, the inspectors suggested that he go to the local police precinct to view some photographs (T. 41). While at the precinct, Davis identified one of the individuals who had accosted him and was instructed by Citera and O'Brien to go into the community where he used to live to see if he could locate the assailant (T. 42). Davis was told not to report for his regular mail delivery duty. Instead, he was instructed to circulate in

¹ References preceded by the letter "T" are to pages of the trial transcript.

the community for a few days to locate the individual. During this time, he was paid his regular postal carrier salary (T. 42-43, 110-11).

Citera and O'Brien testified that they gave Davis specific instructions that, if he saw someone resembling the suspect, he was to do nothing on his own and was to call the inspectors immediately (T. 42). Davis was not asked, however, to investigate any matters other than his own armed robbery (T. 43). He was instructed that, if anyone approached him regarding the sale of stolen checks, he was to make no final arrangements and was to call the inspectors immediately (T. 42, T. 403).

Thereafter, following two or three days of work in his old neighborhood, during which time he was apparently unable to locate his assailant, Davis was instructed to return to his job as a postal carrier and he did so (T. 44).

On February 15, 1977, Citera called Davis to advise him that the person Davis had identified as his assailant had been arrested (T. 45), and on February 22nd Davis went to the inspectors' office to discuss that arrest (T. 46).²

Thus, by February 23rd, Davis had concluded his work with the agents, and the case involving the theft of his mail had been solved. However, in what can only be described as a bizarre turn of events, the victim suddenly became a culprit for, in a matter of days, Davis himself stole a quantity of checks from the mail which he attempted to sell on the street. Unfortunately for Davis, however, his prospective purchaser turned out to be an

² The person arrested for robbing Davis was charged in a complaint in the Eastern District of New York. That matter has not been finally resolved.

undercover postal inspector, and Davis was arrested before he was able to complete the sale of the embezzled mail.

The sequence of events began on the evening of February 24, 1977, at approximately 7 p.m., when a confidential informant called Citera and O'Brien at their office and put Davis on the phone to speak with an individual Davis knew only as "Frankie." "Frankie" was Inspector Frank Citera, but Davis, believing that he was speaking to someone who was interested in purchasing stolen checks and not recognizing Citera's voice, identified himself as "Curtis" and said that he was a postal employee interested in selling checks. He indicated that he had between \$2,000 and \$2,400 worth of checks for sale at half the face value. Citera recognized the voice of the individual to whom he was speaking as that of Davis, and a meeting was arranged for the next day at McDonald's Restaurant on Utica Avenue and Eastern Parkway in Brooklyn. Citera told Davis that he would send a black associate to meet him in reply to which Davis gave a physical description of himself so that he could be recognized (T. 32-38). After this phone conversation, Citera and O'Brien arranged to have undercover agent Harry Elliot meet Davis the following day.

The following day, February 25, 1977, Inspector Elliot was fitted with a recording device and at approximately noon met Davis and Richard West, a friend of Davis', as scheduled at McDonald's on Utica Avenue and Eastern Parkway. After Elliot flashed some money for Davis, Davis suggested that they go outside to his car (T. 143). The pair then left West behind and got into Davis' car, at which time they had a discussion about the sale of the checks. Davis agreed to take one-third of the face value and then handed the checks to Elliot so that he could add them up. Davis identified the checks as ones he had taken from his route (T. 147-48). After

a short conversation, Elliot gave a code word to surveilling agents who were monitoring the conversation and who closed in from the rear of the vehicle.

At that point, Davis, apparently looking in his rear-view mirror, exclaimed "Hold tight." Elliot said, "What's the matter?" Davis replied, "Inspectors here." Elliot asked, "Where?" Davis replied, "Behind us. God damn." (See T. 150 and Gov't Ex. 2A, transcript of tape recording, Gov't Ex. 2). Davis then jumped out of the car and ran across six lanes of traffic to flee from Agents Citera and O'Brien and other agents whom he knew (T. 116-118). He finally halted when told to do so at gunpoint (T. 116, 205). At that point, having been caught red-handed, Davis said "God damn, Citera, I was just going to call you." (T. 112).³

Following his arrest, however, when Elliot was introduced to him as an undercover agent, Davis admitted that he had been selling the checks for his own benefit (T. 121-123).

Davis took the stand and testified in his own behalf. He said that at the time of his arrest he had been working in an undercover capacity to make a big buy of stolen checks for the Postal Service (T. 324). Cf course, he admitted that he was not authorized to do so and that he had not contacted the inspectors to tell them of his undercover work (T. 402-403).⁴

Davis' specious defense was repeatedly disproved at trial. In the first instance, there was uncontradictable evidence, in the form of a tape recording (Gov't Ex. 2),

³ After Davis was arrested two more stolen checks, in addition to those handed to Elliot, were found on the floor in front of the back seat of Davis' car (T. 207).

⁴ The supposed rationale for Davis' sale of checks was that, either Davis would contact the inspectors prior to the buy (which he did not do) or that he would use this buy as a "come-on" for later transactions with the same individuals (T. 411-412).

which established that Davis fled from his car when he saw postal inspectors coming—the same inspectors for whom he was allegedly working. Second, as noted above, after he was arrested and Elliot was introduced to him as an undercover agent, Davis admitted that he was selling the checks for his own benefit (T. 121-23). Additionally, both O'Brien and Citera testified that they had never authorized Davis to act in an undercover capacity or to solicit deals for stolen checks. To the contrary, the inspectors testified that, even had they wished to, they were forbidden by regulations to authorize the sale of checks taken from the mails (T. 115-20, 215). Finally, Davis had been told that, if he was contacted regarding stolen checks, he was to set up a meeting and contact the inspectors immediately. He was specifically instructed not to engage in any such transaction on his own (T. 114).

When cross-examined on this point, Davis admitted that he was told that he was to call the inspectors prior to making any deal, but claimed that he never had the opportunity to do so (T. 402-403). This excuse was shown to be incredible when it was established that Davis had at least fifteen hours in which to contact the inspectors, including four hours during which he was on the job on the morning of February 25th (T. 421-431).

Equally implausible was Davis' explanation of why he ran when he saw the postal inspectors approach his vehicle. He testified that they had guns drawn, while the agents testified that no guns were drawn until Davis started to flee (T. 134). Davis testified that he ran because he saw them approaching with guns drawn, and he assumed that they were the "mafia." (T. 318). When confronted with the fact that the tape revealed that he had told Elliot that "inspectors" were coming, Davis was asked whether he thought that they were "mafia inspectors." Davis replied that he did not know (T. 446).

In short, Davis' defense was refuted by every piece of credible evidence at trial. The jury heard three agents and a tape recording prove beyond any doubt, much less a reasonable doubt, that Davis had negotiated the sale of stolen checks and that, when caught red-handed, he fled from individuals whom he knew to be postal inspectors. Based on the^s overwhelming evidence, the jury returned a verdict of guilty on both counts of the indictment.

ARGUMENT

POINT I

The Lower Court Properly And Adequately Instructed The Jury On The Issue Of Intent.

- A. The court correctly charged that the crime of embezzlement necessitated a finding by the jury that the defendant acted wilfully and with specific intent for a "bad purpose".**

Davis contends that, by allegedly misstating the facts adduced at trial and erroneously interpreting the law, the court failed to instruct the jury properly and sufficiently on the issue of intent (brief at 8). He argues that the trial court improperly framed the issue to be decided as whether the defendant was in fact authorized by the Postal Service to act in an undercover capacity. Davis asserts that the jury should have been charged that the issue to be determined was whether the defendant believed that he was authorized. We respectfully submit that the claim is utterly without merit. By not objecting at trial, Davis waived any objection to the judge's charge on intent. Moreover, even assuming a timely objection, the charge was proper.

At the conclusion of the charge, defense counsel voiced an objection only as to the clarity of the judge's instructions concerning the defendant's presumption of innocence (T. 590-591). Defense counsel made no objection to the charge on criminal intent and, as such, Davis has waived his objection and has failed to preserve the issue for appeal. See Fed. R. Crim. P. 30. In similar circumstances, in *United States v. Brawer*, 482 F.2d 117, 128-130 (2d Cir. 1973), where there was no objection at trial, this Court refused to consider the defendant's argument concerning inadequate instructions with regard to the legal requisites for imputing "knowledge" and presumption thereof. And it is well-settled that, in the absence of plain error, an issue is lost on appeal unless a proper objection is forthcoming prior to the commencement of jury deliberations. See *United States v. Bermudez*, 526 F.2d 89, 97 (2d Cir. 1975); *United States v. Jenkins*, 510 F.2d 495, 499-500 (2d Cir. 1975); *United States v. Rosenthal*, 470 F.2d 837, 843-844 (2d Cir.), *cert. denied*, 412 U.S. 909 (1972); *United States v. Ferrara*, 377 F.2d 16, 18 (2d Cir.), *cert. denied*, 389 U.S. 908 (1967); *United States v. Schabert*, 362 F.2d 369, 373-374 (2d Cir.), *cert. denied*, 385 U.S. 919 (1966).

Moreover, it is clear that there was no error whatsoever in the trial court's instruction regarding intent. The court below, in instructing the jury concerning the requisite elements for an embezzlement conviction, stated that "to embezzle a letter or other mail matter is to *willfully* take for one's own use, such mail . . . which came into the wrongdoer's possession lawfully . . . with the *specific intent* to misappropriate or missaply such letter or any other contents thereof, to the personal use of such employee" (emphasis added) (T. 569). The court then reiterated the components of embezzlement by succinctly instructing that "the offense is the *willfull* taking . . . with the *specific intent* to misappropriate . . ." (emphasis added) (T. 569). The court continued that an action

done wilfully is one "done voluntarily and with the *specific intent to do something the law forbids*. That is to say, *with bad purpose* either to disobey or disregard the law ..." (emphasis added) (T. 573).

Plainly, the court below advised the jury that Davis had to be found to have possessed a "guilty mind" in order to be guilty. Davis' reliance on *United States v. Morissette*, 342 U.S. 246 (1951), is entirely misplaced. In *Morissette*, the United States maintained a practice bombing range on a large, uninhabited tract. Signs were posted at the range prohibiting entry. Nevertheless, the range was commonly known, and used, as a deer hunting ground. While hunting there in broad daylight, defendant Morissette took three tons of spent, rusted bomb casings which were "not stacked or piled in any order but were dumped in heaps". 342 U.S. 246. Morissette testified that he did not intend to steal the casings but believed that they were abandoned. Despite his contention of innocent intention, Morissette was convicted of embezzling government property.

The trial court refused to submit or allow counsel to argue to the jury the issue of whether Morissette acted with innocent intent. To the contrary the court ruled: "[H]e took it because he thought it was abandoned and he knew he was on government property ... that is no defense ... I don't think anybody can have the defense they thought the property was abandoned on another man's piece of property." 342 U.S. 249.

Faced with this absolute refusal by the trial court to permit the jury to hear arguments concerning defendant Morissette's intent and a complete failure to charge that intent is a question of fact to be weighed by the jury, the Supreme Court articulated fundamental concepts of criminal liability. Thus, the court refused to consider Title 18, United States Code, Section 641, the statute

under which *Morissette* was tried and which contained the wording "knowingly converts", as dispensing with the requisite criminal intent ingrained in the law of theft and its derivatives. The *Morissette* decision merely stands for the broad principle that, absent clear congressional intent to the contrary, in construing a criminal statute whose sanction is directed against a criminal act recognized at common law, the court will incorporate concepts of criminal intent into the statute to effecuate the purposes of the criminal justice system.

In the case at bar, there is nothing in the charge that even suggests that Davis could have been convicted on the basis of his merely mechanically performing the acts alleged. To the contrary, the charge is flooded with words imputing intent with "bad purpose." Cases delineating the sufficiency of instructions concerning the meaning of wilfulness have consistently indicated that a specific intent to purposefully violate the law suffices as a definition. See *United States v. Robinson*, 545 F.2d 301, 305-306 (2d Cir. 1976); *United States v. Erb*, 543 F.2d 438, 447 (2d Cir.), *cert. denied*, 429 U.S. 981 (1976); *United States v. Cangiano*, 491 F.2d 906, 909-10 (2d Cir.), *cert. denied*, 419 U.S. 904 (1974); *United States v. Tortorello*, 480 F.2d 764, 785 (2d Cir.), *cert. denied*, 414 U.S. 866 (1973). Thus, it is apparent that the court below fully and fairly apprised the jury as to the requisite criminal intent for sustaining a conviction for embezzlement and that Davis' objection to that portion of the charge is without merit.

- B. The court properly summarized the evidence concerning Davis' contention of authorization and correctly instructed the jurors that, as triers of the facts, it was their duty to assess conflicting evidence by weighing the witnesses' credibility.**

The trial court, in marshaling the evidence, informed the jury of Davis' contention that he was properly authorized to engage in the acts charged and, therefore, that he did not have the requisite intent to commit the offense charged. The court contrasted this allegation with evidence elicited from the Government's witnesses directly refuting this contention (T. 573-574). Contrary to Davis' argument that these remarks represented a misstatement of the facts and that they undercut his defense (brief at 20), the summary was a proper exercise of the trial court's discretion. The boundaries of this broad discretion are exceeded only if the trial court invades the province of the jury or presents an adversarial posture in failing to mention all the evidence favorable to the defendant. See *United States v. Tourine*, 428 F.2d 865, 869 (2d Cir.), *cert. denied*, 400 U.S. 1020 (1970); *United States v. Light*, 394 F.2d 908, 910-911 (2d Cir. 1968). This the trial court did not do.

In calling to the attention of the jury conflicting testimony concerning Davis' assertion that it was his impression that he was authorized to foster sales of checks in connection with a postal investigation, the trial court merely highlighted a factual issue in the case. In concluding that portion of the charge, the court properly instructed the jury that "[t]hese then are the issues for you to determine in this particular case" (T. 574), i.e., whether, in light of Davis' contention that he was authorized and the Government's proof to the contrary, Davis could be said to have had the requisite criminal intent to commit the offense alleged.

Clearly the issue of Davis' belief in the innocence of his conduct was placed squarely before the jury. And in view of the direct evidence presented by the Government concerning Davis' flight and the taped statements of Davis when he saw postal agents closing in for the arrest, the jury could easily and properly assess all the evidence concerning Davis' intent and refuse to credit his argument as to the propriety of his action. In fact, the evidence on this issue was so overwhelming that the jury deliberated but a few hours before returning its guilty verdict.

Accordingly, it is clear that the instruction to the jury that a conviction for embezzlement required a "bad purpose" (T. 573) and that the jury had to weigh the conflicting testimony in determining the credit to be accorded to it, precluded a jury verdict of guilty together with a finding that Davis reasonably believed that he was authorized to engage in the transaction in question.

C. The court clearly and sufficiently instructed the jury that, in order to convict Davis of unlawfully possessing stolen checks, criminal intent had to be established.

Defense counsel's assertion that the judge failed to include the element of criminal intent in his charge concerning the requisites for a conviction for unlawful possession of stolen checks is unconvincing. In instructing the jury as to Count Two of the indictment, the court charged that an essential element for conviction was that at the time of possession the defendant knew the letters or the contents thereof were stolen. The judge instructed that "[an] act is done knowingly when it is done voluntarily and *intentionally* and not because of mistake, accident, or other innocent reason. The purpose of adding the word "Knowingly" was to *insure that no one would*

be convicted of an act done because of mistake, accident, or other innocent reason." (emphasis added) (T. 573). See also (T. 575).

The trial court, therefore, sufficiently conveyed to the members of the jury that they could properly convict only upon finding beyond a reasonable doubt that appellant was actually aware that the checks were stolen and acted intentionally with this knowledge. The court's charge was unlike that ruled improper in *United States v. Bright*, 517 F.2d 584, 586-588 (2d Cir. 1975). In *Bright*, the court, in reciting requisites for a conviction under Title 18, United States Code, Section 1708, equated reckless disregard or a conscious effort to disregard the truth with knowledge. In the case at bar, the court directly equated knowledge with an intentional act and precluded a conviction based upon mistake, accident, or other innocent reason. Thus, there was nothing in the trial court's charge which could have led the jury to base a conviction upon anything short of a finding willful and intentional conduct.

POINT II

The Court Plainly And Comprehensively Charged That Davis' Presumption Of Innocence Prevailed Until Guilt Was Proven Beyond A Reasonable Doubt.

Davis contends that the court gave a "scanty and misleading charge" (brief at 22) which failed to properly apprise the jury of the burden upon the Government in sustaining a conviction. Specifically, Davis argues that the trial court's reference to the fact^{that} a defendant begins the trial with "a clean slate" and with "no evidence" was somehow erroneous. We disagree.

The trial court properly instructed that,

"the law presumes a defendant to be innocent of a crime. Thus, a defendant, although accused, begins the trial with a clean slate, without evidence against him. The law permits nothing but legal evidence presented before the jury to be considered in support of any charge against the accused. *So the presumption of innocence alone is sufficient to acquit a defendant unless the jury is satisfied beyond a reasonable doubt of the defendant's guilt, after careful and impartial consideration of all the evidence in the case.* The burden is always upon the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to the defendant, so the law never imposes upon the defendant in a criminal case the burden or duty of calling any witnesses and producing any evidence." (emphasis added) (T. 565-566).

In defining "reasonable doubt," the court instructed that it is "a doubt based upon reason and common sense; the kind of doubt that would make a reasonable person hesitate to act. *Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character you would be willing to rely and act upon it unhesitatingly in the most important of your affairs*" (emphasis added) (T. 566-567).

The hesitate to act formulation of reasonable doubt is in complete conformity with the guidelines enunciated in *Holland v. United States*, 348 U.S. 121, 140 (1954). Furthermore, the court's instructions relating to a defendant's presumption of innocence and the definition of a reasonable doubt were identical to instructions which have been consistently upheld in this circuit. See *United States v. Magnano*, 543 F.2d 431, 436 (2d Cir. 1976); *United States v. Hart*, 407 F.2d 1087, 1091 (2d Cir.

1969); *United States v. Aiken*, 373 F.2d 294, 299 (2d Cir. 1967); *United States v. Heap*, 345 F.2d 170, 171 (2d Cir. 1965). The reference to the defendant starting trial with a "clean slate" with "no evidence *against him*" (emphasis added), when read in the context of the charge as a whole, was entirely proper. Accordingly, it is apparent that appellant's claim that the trial court's instruction deprived him of his right to a presumption of innocence until proven guilty beyond a reasonable doubt is without merit.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: Brooklyn, New York
October 3, 1977

Respectfully submitted,

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